IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-961

WARREN GAMBINO,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

REPLY BRIEF OF WARREN GAMBINO, PETITIONER

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REPLY BRIEF OF WARREN GAMBINO, PETITIONER

MAY IT PLEASE THE COURT:

Petitioner, Warren Gambino, replies to the Response of the State of Louisiana:

1.

RETROACTIVE APPLICATION

In its Response, the State contends that this Honorable Court may not consider the issue of retroac-

tive application of a new statutory interpretation because it was not raised before the Louisiana Supreme Court. It would appear obvious that the issue could not have been raised until the statute was interpreted and applied retroactively by the Louisiana Supreme Court.

2.

VAGUENESS AND OVERBREADTH

The portion of the Louisiana Obscenity Statute at issue in the present case is not, as the State implies in its Response, based upon *Miller v. California*, 413 U.S. 15 (1973). It is based on *Paris Adult Theatre I v. Slayton*, 413 U.S. 39 (1973) and was designed to give the retail merchant "the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." *Ib* at 55. The basis of Petitioner's argument is simply that, through its application of the Statute in this case, the Louisiana Supreme Court has made it impossible for the retailer to know whether or not he will receive such notice.

The subjective nature of the Louisiana Supreme Court's reasoning is reflected in the State's Response. Neither explains the manner in which photographs are able to use "an explicit close-up depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts" without depicting sexual penetration.

3.

SPECIAL JURY CHARGES

The State contends in its Response that the issue of special jury charges was not presented to the Louisiana Supreme Court. In fact, the issue was squarely raised by Assignments of Error 14 and 16, was briefly discussed in Gambino's brief, and the Louisiana Supreme Court questioned Counsel on this issue during oral argument. In its opinion, the Louisiana Supreme Court purported to decide Assignments of Error 14 and 16. See *State v. Gambino*, 362 So.2d 1107, 1109 (La.1978). Because the Louisiana Supreme Court's opinion incorrectly stated, as a fact, that the jury had made the disputed determination, *Ib* at 1110, 1111, Gambino again urged this issue in his Application for Rehearing.

Thus Petitioner raised the jury charge issue at every stage of the State proceedings with no success. He has never, as the State contends in its response, waived this issue nor does he desire to do so.

4.

THE TRIAL JURY

The State is correct in its contention that Gambino failed to raise this issue before the Louisiana Courts. The issue is, however, "plain error" and has been specifically characterized as such by the Louisiana Supreme Court in *State v. Wrestle, Inc.*, 360 So.2d 831, 837 (now pending on the docket of this Honorable

Court *sub nom Daniel Burch and Wrestle, Inc. v. State of Louisiana*, No. 78-90.) Accordingly, this Honorable Court may take cognizance of the issue pursuant to its own "plain error" doctrine as stated in Supreme Court Rule 40(d).

The purpose of requiring submission of issues to State Courts prior to this Honorable Court is to allow correction of constitutional error at the lowest possible level and to conserve the time of the Supreme Court of the United States. In the present case, such submission would have accomplished neither purpose. The Louisiana Supreme Court had already determined this issue on June 19, 1978 in *State v. Wrestle, Inc., supra*. There is no reason to believe that a different result would have been reached on September 5, 1978, when the present case was decided.

5.
THE "TAKEN AS A WHOLE" TEST

In its Response, the State does not even contend that the Louisiana Supreme Court applied the correct standard in its independent review of "National Screw." Instead, it argues that the alleged obscene portions of the magazine outweigh its socially acceptable features. When the Louisiana Supreme Court was faced with Petitioner's similar *factual* argument that the protected portions outweighed the obscene, it chose not to apply the test. This choice was constitutionally erroneous and calls for the issuance of a Writ of Certiorari.

The State attempts to distinguish *Penthouse Intern., Ltd. v. McAuliffe*, 454 F. Supp. 289 (N.D. Ga. 1978) not on the legal issues decided therein but on the "fact" that " 'National Screw' is clearly not in the same category as 'Playboy', 'Penthouse', and 'Oui' ". See State Response, p.6. Generally, there is little difference in the format of the various magazines, each consisting of a mixture of sexually and non-sexually oriented material. While "National Screw" may be more inexpensively produced than the others, the size of one's pocketbook has never been the measure of constitutional protection.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this ____ day of February, 1979, forwarded three copies of the foregoing Reply Brief of Warren Gambino to the District Attorney for the Parish of Orleans, Honorable Harry Connick, by United States mail, postage prepaid.

WILLIAM M. LUCAS, JR.